

No. 12-5054

**IN THE UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA**

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THE ELECTRONIC PRIVACY INFORMATION CENTER

*Petitioner,*

v.

THE UNITED STATES FEDERAL TRADE COMMISSION

*Respondent.*

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**EMERGENCY MOTION FOR SUMMARY REVERSAL AND  
EXPEDITED CONSIDERATION OF APPEAL**

**DECISION NEEDED NO LATER THAN FEBRUARY 28, 2012**

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**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

Pursuant to F.R.A.P. 26.1, and D.C. Cir. Rules 27(a)(4) and 28(a)(1)(A), counsel for Petitioner certifies as follows:

**A. Parties and Amici Curiae**

Petitioner is the Electronic Privacy Information Center (“EPIC”). EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, nor affiliate. EPIC has never issued shares or debt securities to the public. EPIC is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.

No intervenors or amici are involved in this matter.

Respondent is the United States Federal Trade Commission. (“FTC”).

**B. Ruling Under Review**

Petitioner seeks review and reversal of the February 24, 2012 Order in *EPIC v. FTC*, Case No. 12-206(ABJ) slip op. (D.D.C. Feb. 24, 2012) (the “District Court Order” and “Memorandum Opinion”). Neither the Court’s opinion nor order has been published as of the date of this filing.

The District Court dismissed *EPIC v. FTC*, EPIC’s Administrative Procedure Act case seeking to compel the FTC to enforce the Oct. 13, 2011

Consent Order between the Commission and Google, Inc. A copy of the Oct. 13, 2011 Consent Order is attached as Exhibit 1.

The District Court held “the FTC’s decision whether to enforce the Consent Order [between the agency and Google, Inc.] is committed to agency discretion and is not subject to judicial review ... [therefore] the complaint fails to state a claim upon which relief can be granted.”

Memorandum Opinion at 12. The District Court Order and Memorandum Opinion are attached to this motion as Exhibit 2 and Exhibit 3.

**C. Related Cases**

The case on review was not previously before this Court. Petitioner is unaware of any similar cases currently pending in this Court or in any other court.

/s/ John Verdi

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**F.R.A.P. 26.1 CORPORATE DISCLOSURE STATEMENT**

Petitioner the Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., that was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, or affiliate. EPIC has never issued shares or debt securities to the public.

Respectfully submitted,

*/s/ John Verdi*

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## **GLOSSARY**

APA	Administrative Procedure Act
EPIC	Electronic Privacy Information Center
FTC	Federal Trade Commission

## INDEX OF EXHIBITS

Exhibit 1.....	Oct. 13, 2011 Consent Order between the FTC and Google, Inc.
Exhibit 2.....	February 24, 2012 District Court Order in <i>EPIC v. FTC</i>
Exhibit 3.....	February 24, 2012 District Court Memorandum Opinion in <i>EPIC v. FTC</i>

## INTRODUCTION

Petitioner moves for emergency relief – the summary reversal of the February 24, 2012 District Court Order dismissing EPIC’s Administrative Procedure Act lawsuit against the FTC.

The exigency of this matter arises from the FTC’s failure to enforce the Oct. 13, 2011 Consent Order between the Commission and Google, Inc. (“Google”). Google has announced that, on March 1, 2012, the company will change its terms of service for current users of Google services. The announced change will consolidate users’ personal information across more than 60 Google services in clear violation of Google’s prior commitments to the Federal Trade Commission. The company has rejected all requests to postpone the change in business practices.

As set forth below, the U.S. District Court for the District of Columbia has jurisdiction to hear EPIC’s lawsuit. And EPIC’s Complaint states a claim upon which relief can be granted – the FTC has a non-discretionary duty to enforce the Oct. 13, 2011 Consent Order. The FTC has thus far failed to take any action regarding this matter, placing the privacy interests of literally hundreds of millions Internet users at grave risk.

## JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1291, “The courts of appeals... shall have jurisdiction of appeals from all final decisions of the district courts of the United States.” The District Court Order is a final decision.

## FACTUAL BACKGROUND

### **I. Google Engaged in Unfair and Deceptive Trade Practices that Disclosed Consumers’ Personal Information Without Consent**

On Tuesday, February 9, 2010, Google attempted to launch a social networking service, Google Buzz. Complaint at 2, *In the Matter of Google Inc.*, FTC File No. 102 3136 (October 13, 2011), *available at* <http://www.ftc.gov/os/caselist/1023136/111024googlebuzzcmpt.pdf>. As part of this attempt, Google took information that users provided for Google electronic mail service Gmail and used it to populate Buzz, a separate and discrete social network service. *Id.* Google transferred the data of the users of Gmail even in those circumstances where users purposefully chose not to sign up for the social network services. *Id.* at 3.

As the Federal Trade Commission subsequently determined, Google’s practices concerning Buzz were unfair and deceptive. Google’s terms of service stated that Google would use information given by Gmail users only for to provide email services. *Id.* Instead, Google used this information in Buzz. *Id.* Google also deceptively claimed that it would seek the consent of users before using their

information for a purpose other than that for which it was collected. *Id.* at 6.

Furthermore, Google misrepresented the ability of users to exercise control over their information. *Id.* at 6.

## **II. EPIC’s Initial Complaint with the Federal Trade Commission Gave Rise to the Subsequent Investigation and Final Consent Order with Google**

On February 16, 2010, within a week of the introduction of Buzz, EPIC filed a complaint with the Federal Trade Commission urging the Commission to investigate the launch of Google Buzz and to determine whether the company had engaged in unfair and deceptive trade practices, in violation of Section 5 of the FTC Act. Complaint of the Elec. Privacy Info. Ctr. at 13-15, *In the Matter of Google, Inc.*, FTC File No. 102 3136 (Feb. 16, 2010), *available at* [https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz\\_Complaint.pdf](https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf).

EPIC’s complaint urged the FTC to “enjoin [Google’s] unfair and deceptive business practices and require Google to protect the privacy of Gmail users.” Complaint of the Elec. Privacy Info. Ctr., *supra*.

## **III. Subsequent to the filing of the Complaint by EPIC, the Federal Trade Commission Undertook an Investigation and Entered a Final Order Against Google**

On March 30, 2011, the FTC released a Complaint and announced a proposed Consent Order with Google. The Commission found that Google had launched Buzz through Gmail, and that “options for declining or leaving the social

network were ineffective.” Press Release, FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network, Federal Trade Commission, Mar. 30, 2011, <http://www.ftc.gov/opa/2011/03/google.shtm>. Furthermore, controls for limiting the disclosure of personal information were “confusing and difficult to find . . . .” *Id.*

In announcing the Consent Order, Jon Leibowitz, Chairman of the FTC, said, “when companies make privacy pledges, they need to honor them.” *Id.* The FTC acknowledged the significance of EPIC’s complaint in the agency’s action. *Id.* The Federal Trade Commission opened the proposed Consent Order for public comment.

The FTC issued the final Consent Order on October 13, 2011. Exhibit 1. The Consent Order contains nine parts. Decision and Order, *In the Matter of Google, Inc.*, FTC File No. 102 3136 (Oct. 13, 2011), *available at* <http://www.ftc.gov/os/caselist/1023136/111024googlebuzzdo.pdf>. Part I prohibits Google from misrepresenting (a) the extent to which it “maintains and protects the privacy and confidentiality” of personal information, and (b) the extent to which it complies with the U.S.-EU Safe Harbor Framework. *Id.* at 3. Part II requires Google to obtain “express affirmative consent” before “any new or additional sharing by [Google] of the Google user’s identified information with any third party . . . .” *Id.* at 3-4. Part III requires Google to implement a “comprehensive

privacy program” that is designed to address privacy risks and protect the privacy and confidentiality of personal information. *Id.* at 4. Part IV requires Google to submit to independent, biennial privacy assessments, which are then to be provided to the FTC. *Id.* at 5. Finally, Parts V-IX require Google to make copies of certain privacy-related documents available to the FTC, to deliver the Consent Order to all officers and directors, to notify the FTC thirty days before any major change in corporate structure or status that might affect compliance, and to file a report with the FTC in 90 days describing compliance Google with the Agreement. *Id.* at 5-7.

**IV. Google Recently Announced Changes in Business Practices that Would Violate the Consent Order; the Changes will take Effect March 1, 2012**

On January 24, 2012, Google announced that, effective March 1, the company will change its terms of service, and use the personal information obtained from user in ways inconsistent with the original collection. Exhibits 10-11. Rather than keeping personal information about a user of a given Google service separate from information gathered from other Google services, Google will consolidate user data from across its services and create a single merged profile for each user. Users will no longer be able to keep the personal information they provided to use the Google email service for simply that service; Google will be able to combine the user information provided for email with other Google services, including the Google social network service.

Google stated: “Our new Privacy Policy makes clear that, if you’re signed in, we may combine information you've provided from one service with information from other services. In short, we’ll treat you as a single user across all our products ....” *Updating our Privacy Policies and Terms of Service*, The Google Blog (Jan. 24, 2012 1:30 PM), <http://googleblog.blogspot.com/2012/01/updating-our-privacy-policies-and-terms.html>.

These changes violate the Consent Order between Google and the FTC. As set forth below, Google violated Part I(a) of the Consent Order by misrepresenting the extent to which it maintains and protects the privacy and confidentiality of covered information. Google also violated Part I(b) of the Consent Order by misrepresenting the extent to which it complies with the U.S.-EU Safe Harbor Framework. Google violated Part II of the Consent Order by failing to obtain affirmative consent from users prior to sharing their information with third parties. Google violated Part III of the Consent Order by failing to comply with the requirements of a comprehensive privacy program.

#### **IV. The FTC Has not Enforced the Consent Order**

To date, the FTC has failed to take any action with respect to Google’s imminent changes in privacy practices. Critically, the Commission has not filed a lawsuit pursuant to, the Federal Trade Commission Act which states that the FTC

“*shall*” obtain injunctive relief and recover civil penalties against companies that violate consent orders. 15 U.S.C. § 45(l) (2011) (emphasis added).

## ARGUMENT

A motion seeking emergency relief “must state the reasons for granting the stay or other emergency relief sought and discuss, with specificity, each of the following factors: (i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest.” D.C. Cir. R. 18(a)(1).

EPIC is likely to prevail on the merits, and is certain to suffer irreparable injury if their motion is not granted. The Court must act now to prevent irreparable injury to EPIC and the public at large. The prospect of harm to the FTC is low if the motion is granted, and the public interest strongly favors EPIC’s motion.

The District Court held “the FTC’s decision whether to enforce the Consent Order [between the agency and Google, Inc.] is committed to agency discretion and is not subject to judicial review ... [therefore] the complaint fails to state a claim upon which relief can be granted.” Memorandum Opinion at 12. As set forth below, the District Court erred.

### **I. Petitioners are Likely to Prevail on the Merits**

EPIC's primary claim in this lawsuit is straightforward: the FTC investigated Google's conduct in launching Google Buzz, found the company's conduct to be unfair and deceptive, and entered into a consent order with Google to ensure that similar conduct would not reoccur. Google's recent announcement that the company intends to consolidate users' personal information without individuals' consent violates the consent order and threatens to harm consumers. The FTC is required to enforce the consent order. But the Commission has failed to do so.

*A. The FTC has Unlawfully Withheld Agency Action by Failing to Enforce the Consent Order*

EPIC may "compel agency action unlawfully withheld" pursuant to the Administrative Procedure Act. 5 U.S.C. § 706(1) (2011). "Agency action unlawfully withheld" is defined as "*discrete* agency action that [the agency] is *required to take.*" *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original). Agency action is the "whole or part of an agency rule order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551 (13) (2011). Agency action, including a "failure to act" is subject to judicial review. *Amador County, Cal. v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011).<sup>1</sup>

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<sup>1</sup> This court has previously held that a plaintiff cannot maintain "private actions ... asserted under the Federal Trade Commission Act." *Holloway v. Bristol-Myers*

The FTC is required to “prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2) (2011). *Accord Carter, Fullerton & Hayes, LLC v. F.T.C.*, 637 F. Supp. 2d 1, 9 (D.D.C. 2009); *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25, 32 (D.D.C. 1999) *aff’d in part, rev’d in part sub nom. FTC v. Mylan Laboratories, Inc.*, 99 F. Supp. 2d 1 (D.D.C. 1999). To that end, the FTC enters into consent orders with such “persons, partnerships, or corporations” to prevent unfair and deceptive trade practices. If such an order is violated, the party “*shall* forfeit a penalty to the United States” and be subject to the exclusive enforcement power of the FTC. *See* 15 U.S.C. §45(l) (emphasis added); 15 U.S.C. § 56(a)(2) (2011); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 994 (D.C. Cir. 1973) (citing *United States v. Saint Regis Paper Co.*, 355 F.2d 688 (2d Cir. 1966)).

This court has not had occasion to consider whether the FTC is “required to take” enforcement action when its consent orders are violated, but it is clear from the statute that the Commission is required to enforce its orders. The FTC has

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*Corp.*, 485 F.2d 986, 987 (D.C. Cir. 1973). However, this does not bar adjudication of claims against the FTC under the Administrative Procedure Act 5 U.S.C. § 706 for agency action unlawfully withheld. *See Amador County, Cal. v. Salazar*, 640 F.3d 373, 380 (D.C. Cir. 2011) (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671-72 (1986)). There is a “the strong presumption that Congress intends judicial review of administrative action.” *Bowen*, 476 U.S. at 670.

exclusive authority over the enforcement of its consent orders. *See id.* The enforcement provision of the FTC Act, Section 5(l), makes clear that the agency action is not discretionary; a violating party “shall forfeit” a penalty and be subject to an enforcement action.

The FTC’s failure to act on Google’s violation of the FTC’s Consent Order—which includes Google misrepresenting its business practices—contravenes the FTC’s nondiscretionary duty to prevent corporations from using “deceptive acts or practices in or affecting commerce.” The violation of a consent order is a discrete act, as is the agency’s decision to enforce or not enforce the order. Accordingly, the FTC has failed to perform “a discrete agency action” by failing to enforce its final order.

The FTC is charged with performing a “discrete agency action.” A “discrete agency action” is a “final agency action” under the APA. *In re Aiken County*, 645 F.3d 428, 437 (D.C. Cir. 2011) (quoting *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C.Cir. 2006)). Here the FTC unlawfully withheld such an action -- namely commencing a civil action for violation of its consent order, or authorizing the Attorney General to do so—and has failed to perform by not enforcing its October 13, 2011 consent order against Google.

*B. Chaney Does Not Preclude Judicial Review of This Matter*

The *Chaney* Court “conclude[d]” that “the *presumption* that agency decisions to *institute proceedings* are unreviewable under 5 U.S.C. § 701(a)(2) is not overcome by the *enforcement provisions of the [Federal Food, Drug, and Cosmetic Act]*.” *Heckler v. Chaney*, 470 U.S. 821, 837 (1985) (emphasis added). The Court’s holding provides three distinct reasons to distinguish the matter now before this Court.

First, *Chaney* did not bar judicial review of agency action. *See Block v. SEC*, 50 F.3d 1078, 1082 (D.C. Cir. 1995) (“The presumption against judicial review in *Chaney* is not irrebuttable.”). The Court said that if Congress has “provided meaningful standards for defining the limits of that discretion, there is ‘law to apply’ under § 701(a)(2), and courts may require that the agency follow that law.” *Heckler*, 470 U.S. at 835-36. *See Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987). (“an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its discretion.”)

Section 45(l) of the FTCA and the FTC Consent Order provide the “law to apply” in this matter. The enforcement provision in the FTCA states unambiguously that a person “who violates an order of the Commission after it has become final” shall pay a civil penalty. 15 U.S.C. § 45(l). The Consent Order is a final order of the Commission that sets out specific terms, the violation of which

would trigger the enforcement provision. The text of the Consent Order provides the “meaningful standard” that the courts can apply. *See Heckler*, 470 U.S. at 834.

*Chaney*, the DC circuit court and DC district courts have addressed the “law to apply” doctrine when confronted with the question of whether final rules are subject to judicial review. *See, e.g. Heckler*, 470 U.S. at 826, 834-36; *Mistick PBT*, 440 F.3d at 509; *Giacobbi v. Biermann*, 780 F. Supp. 33, 37 (D.D.C. 1992).

Agency regulations provide “law to apply” if they “set out specific criteria that are capable of review.” *Mistick PBT*, 440 F.3d at 509 (conformance regulations set out specific criteria that are capable of review.); *Giacobbi*, 780 F. Supp. at 37 (finding that the agency enforcement provision and the agency regulation constitute law to apply.)<sup>2</sup>

Significantly, the *Chaney* Court dismissed a “policy statement” as “law to apply” because it was “vague,” not an agency rule, unrelated to enforcement power, and contrary to “express assertion of unreviewable discretion.” *Heckler*, 470 U.S. at 836. On each point, the FTC Consent Order produces the opposite conclusion: it is precise, made final through a public-rulemaking, directly tied to

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<sup>2</sup> To the extent that the government steers near this territory, it asserts the “presumption of unreviewability ‘may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.’ *Id.* at 833. The FTC Act provides no such guidelines.” Def. Mem. at 7. The government simply ignores the significance of the Consent Order as “law to apply” and the cases, including *Chaney*, which establish that agency policies, and most certainly final orders, provide meaningful standards for courts to apply.

the agency's enforcement power, and explicitly described in the agency's enforcement provision. Further, the *Chaney* Court's analysis of the policy statement acknowledged that the agency itself could generate the "law to apply" on which a court could rely. *Heckler*, 470 U.S. at 839.

The presence of "law to apply" is sufficient to overcome the presumption against unreviewability in *Chaney*. *Heckler*, 470 U.S. at 834-35.

The *Chaney* court was concerned about judicial review of decisions by agencies to *initiate* actions. The Court repeatedly used the phrase "institute proceedings," including investigations, *Heckler*, 470 U.S. at 825, 832, and 835-36, to emphasize that the question before the Court was whether the FDA could be compelled to *begin* an enforcement action. Indeed, Respondent in *Chaney* had urged the FDA to "take various investigatory and enforcement actions" which the FDA Commissioner declined to do.<sup>3</sup>

EPIC has not asked the FTC to "institute proceedings;" it has asked the agency to enforce a final order that resulted from the agency's own prior investigation and enforcement actions. Far from the analogy to prosecutorial

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<sup>3</sup> Respondents had asked the FDA to "affix warnings to the labels of all the drugs stating that they were unapproved and unsafe for human execution, to send statements to the drug manufacturers and prison administrators stating that the drugs should not be so used, to adopt procedures for seizing the drugs from state prisons and to recommend the prosecution of all those in the chain of distribution who knowingly distribute or purchase the drugs with intent to use them for human execution." *Heckler*, 470 U.S. at 824.

discretion that the government proffers, the much closer analogy is to enforcement of a breach of contract, as the Consent Order constitutes a “legally binding commitment enforceable under § 706(1).” *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 71-72 (2004) (a land use plan is not a binding commitment because it creates future obligations without necessary funding, however action “may be compelled when the plan merely reiterates duties the agency is already obligated to perform, . . .”) This is not a question that is subject to a wide variety of answers as may be the case when the agency seeks to decide which matters to pursue or how best to pursue them. This is a “discrete agency” action. As the Court also explained in *Utah Wilderness Alliance*, “The important point is that a ‘failure to act’ is properly understood to be limited . . . to a discrete action.” *Norton*, 542 U.S. at 63.

Third, the enforcement statute at issue in *Chaney* is very different from the one before this Court. That statute contained vague terms and was “drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler*, 470 U.S. at 830. In contrast, Section 45(l) could hardly be more precise.

## **II. Millions of Internet Users, Including EPIC, Will Face Irreparable Damage if EPIC’s Emergency Motion is Denied**

Without summary reversal of the District Court Order, Google will merge users’ personal information on March 1, despite the fact that the merger will harm

consumers and violate the Oct. 13, 2011 Consent Order.

The FTC's failure to prevent the implementation of Google's new Privacy Policy will cause irreparable harm to all Google users, including EPIC.<sup>4</sup>

"Irreparable injury" must be "both certain and great; it must be actual and not theoretical." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir.1985) (per curiam)). The moving party must show a "clear and present need for equitable relief," that is "beyond remediation." *Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of Fed. Reserve Sys.*, 773 F. Supp. 2d 151, 179-80 (D.D.C. 2011). When a plaintiff faces "certain and imminent" injury with no way to recover the loss, it weighs in favor of finding "irreparable injury." *Id.*

Irreparable injury may be presumed in an unfair competition action. *See Krause Intern., Inc. v. Reed Elsevier, Inc.*, 866 F.Supp. 585, 587 (D.D.C. 1994) ("trademark infringement and unfair competition are, by their very nature,

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<sup>4</sup> Google recently announced during its quarterly "earnings call" that its Gmail service has 350 million users. Harrison Weber, *Gmail Closes in on Hotmail with 350 MM Active Users*, TheNextWeb, Jan. 19, 2012, available at <http://thenextweb.com/google/2012/01/19/gmail-closes-in-on-hotmail-with-350-mm-active-users/>. According to Google's quarterly earnings statement, more than 46% of Google revenue is generated in the United States. Google Inc., Annual Report (Form 10-K), at 8 (Jan. 26, 2012). According to recent 2010 comScore, J.P. Morgan estimates, 81% of US Internet users access Google services. Peter Kafka, *Why is Facebook Worth \$50 Billion? Check Out These Charts*, All Things D (Jan. 3, 2011), available at <http://allthingsd.com/20110103/why-is-facebook-worth-50-billion-check-out-these-charts/>.

activities that cause irreparable harm.”) (quoting *Sears, Roebuck & Co. v. Sears Financial Network*, 576 F.Supp. 857, 864 (D.D.C. 1983); *See also, Paschall v. Kansas City Star Co.*, 441 F. Supp. 349, 359 (W.D. Mo. 1977) (citing *Foremost International Tours, Inc. v. Qantas Airways, Ltd.*, 379 F.Supp. 88, 97 (D.Hawaii 1974), *aff'd*, 525 F.2d 281 (9th Cir. 1975)). Furthermore, it is well established that injunctive relief is appropriate to prevent harm to privacy interests such as misappropriation. *See Raymen v. United Senior Ass'n, Inc.*, No. 05-486, 2005 WL 607916 at \*4 (D.D.C. Mar. 16, 2005) (citing *Factors Etc., Inc. v. Pro Arts., Inc.*, 579 F.2d 215, 220 (2d Cir.1978); *Ryan v. Volpone Stamp Co.*, 107 F.Supp.2d 369, 404 (S.D.N.Y.2000); *Ali v. Playgirl, Inc.*, 447 F.Supp. 723, 729 (S.D.N.Y.1978)). Cases in which injunctive relief has been sought to “protect privacy interests” have held that “proof of damages or unjust enrichment may be extremely difficult,” and thus injunctive relief is often appropriate. *Id.* (citing *Ali*, 447 F.Supp. at 729).

In February 2010, EPIC filed a complaint with the FTC alleging that Google had engaged in unfair and deceptive trade practices in violation of the FTC Act, 15 U.S.C. § 45 (2011). Based directly on EPIC’s complaint, the FTC issued a complaint against Google on March 30, 2011, alleging unfair and deceptive business practices related to Google Buzz and Gmail that involved using customer information for purposes other than those to which the user explicitly agreed. *See Complaint, In the Matter of Google, Inc.*, FTC File No. 102 3136 (FTC, Mar. 30,

2011). The FTC stated that EPIC's complaint instigated the investigation of Google. Press Release, Federal Trade Commission, FTC Charges Deceptive Privacy Practices in Google's Rollout of its Buzz Social Network (Mar. 30, 2011), *available at* <http://www.ftc.gov/opa/2011/03/google.shtm>. On October 31, 2011, the FTC and Google finalized the Consent Order based on the FTC Complaint that requires, *inter alia*, Google to establish a comprehensive privacy program and to refrain from misrepresenting company practices. Decision and Order, *supra* at 3-5.

On March 1, 2012, Google will change its terms of service and privacy policy in order to authorize new business practices. This change will impact all Google users, including EPIC, which maintains a Google account under the user name "EPICprivacy." EPIC staff members and board members maintain personal Google accounts.

Google has described the change as creating "one beautifully simple and intuitive experience." Google, *One Policy, One Google Experience*, <https://www.google.com/intl/en/policies/> (last visited Feb. 6, 2012) ("Google Privacy Overview"). Google asserts that "protecting your privacy hasn't changed." *Id.* However, that statement is clearly false, by Google's own admission, and in clear contravention of the consent order. Google's proposed changes involve taking user information from all Google services, which is clearly prohibited under the current terms of services. *See Preview: Privacy Policy*, Google,

<http://www.google.com/intl/en/policies/privacy/preview/> (last visited Feb. 6, 2012); *see also* Jennifer Valentino-DeVries, *What Do Google's Privacy Changes Mean for You?*, WALL STREET JOURNAL (Jan. 25, 2012, 2:10 PM), <http://blogs.wsj.com/digits/2012/01/25/what-do-googles-privacy-changes-mean-for-you/>.

Indeed, these changes in the current terms of services are necessary because otherwise the company could not engage in the change in business practices it intends to pursue. These changes in Google's business practices, which will harm users' privacy, were misrepresented in Google's notice to customers, and Google failed to obtain meaningful consent for these changes. *See* Google Privacy Overview.

This imminent change in Google's business practices threatens the same customer interests that the FTC's Consent Decree sought to protect. If the FTC does not act to prevent the change, all Google users, including EPIC, face an imminent harm that is both certain and great. *See Chaplaincy of Full Gospel Churches*, 454 F.3d at 297.

As the FTC made clear in the Commission's Complaint and Consent Order, Google's use of customer information without meaningful consent and its misrepresentations about such use are unfair and deceptive trade practices. The consolidation of customer information across Google services is a clear

misappropriation of customer information. Google's new business practices violate the terms of the Consent Order, and all the harms that gave rise to the original FTC complaint will re-occur if these changes go into effect.

The FTC is directly responsible for the harm faced by EPIC and all users of Google services. Unless the FTC acts to prevent Google's change in Privacy Policy, users' personal information will be misappropriated, combined, and disclosed by Google in clear contravention of the consent order.

The FTC has the authority and the obligation to enforce the consent order pursuant to the Federal Trade Commission Act. Users have no practical way to do so.

### **III. There is Little Possibility of Harm to Respondent if Relief is Granted**

In this case it is clear that the FTC will suffer no cognizable injury from the enforcement of its consent order. If this court provides the injunctive relief requested, the Commission will merely be required to do what is clearly in its interest: enforcing its consent order to prevent unfair and deceptive trade practices.

The Commission has argued successfully that “[t]he public interest in ensuring the enforcement of federal consumer protection laws is strong.” *FTC v. Mallett*, No. 11-01664 CKK, 2011 WL 4852228, \*6 (D.D.C. Oct. 13, 2011). The Commission is obligated to promote the public interest and to prevent corporations “from using unfair methods of competition.” 15 U.S.C. § 45(a)(2). To this end, the Commission conducts investigations and takes action when it identifies unfair and

deceptive trade practices. The Commission can not suffer a cognizable harm if it is made to enforce its own consent order, because it has no legitimate interest in failing to enforce its own order.<sup>5</sup>

#### **IV. There is a Strong Public Interest in Granting Petitioner's Motion**

It is well established that there is a strong public interest in favor of the enforcement of public laws and regulations. *F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (recognizing “the public interest in effective enforcement of the antitrust laws.”); *F.T.C. v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980). Millions of Google users will benefit from enforcement of the consent order. Users will retain control over their personal information and will not be subjected to unfair and deceptive business practices. Accordingly, the public interest, like the other injunctive factors, strongly favors the granting of a injunctive relief compelling the FTC to enforce the 2011 Consent Order.

#### **CONCLUSION**

This Court should reverse the District Court Order and remand the case with instructions that the District Court reach the merits of EPIC's Administrative Procedure Act claim and requests for injunctive relief.

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<sup>5</sup> Google is not a party to this lawsuit. Insofar as the company is an “interested party,” EPIC's requested injunctive relief will not harm Google's interests. Just as the FTC does not have a legitimate interest in a violation of the consent order, Google cannot have a cognizable legal interest in acting unlawfully. EPIC's sole requested relief is enforcement of the consent order.

Respectfully submitted,

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Dated: February 24, 2012

**RULE 32(A) CERTIFICATE**

I hereby certify that the foregoing EMERGENCY MOTION FOR SUMMARY REVERSAL AND EXPEDITED CONSIDERATION OF APPEAL complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type-style requirements of Rule 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the 20-page limit of Rule 27(d)(2).

*/s/ John Verdi*

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